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IN THE

Supreme Court of the United States

DARIUS D. BISHOP, ALVIN C. FLEMING, and JOHN F. BROWN,

Petitioners,

v.

STATE OF NEW JERSEY and THE NEW JERSEY DEPARTMENT OF PERSONNEL AND MERIT SYSTEM BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners' Complaint in this case alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII"), the Uniform Guidelines on Employee Selection Procedures adopted pursuant to Title VII, a 1980 Consent Decree, the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"), and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -42 ("LAD"). All of their claims stem from a discriminatory examination, which was used to create an eligibility list of firemen who could be promoted to the position of fire captain for the City of Newark.

The Third Circuit affirmed the District Court's dismissal of petitioners' Complaint on the grounds that it was barred by the statute of limitations, due to petitioners' failure to file an EEOC charge within 300 days of the publication of the eligibility list. The limited issue raised in this Petition for Certiorari is whether the Third Circuit erred in refusing to apply the continuing violation theory to petitioners' Title VII claims on the grounds that the discriminatory act was limited to the publication of the list, and did not extend to promotions made from the list.

LIST OF PARTIES

The petitioners in this action are Darius D. Bishop ("Bishop"), Alvin C. Fleming ("Fleming") and John F. Brown ("Brown"). The other plaintiffs to the District Court action, Eric Barnes, Charles D. Bishop, Willie J. Booker, Samuel Evans, Todd Hayes, William E. James and Curtis Johnson, did not pass the 2000 fire captain examination, and thus, were not parties to the appeal to the Third Circuit.

The respondents to this petition are the State of New Jersey and the New Jersey Department of Personnel and Merit System Board. Because the District Court Complaint against defendants City of Newark and the Newark Fire Department was not dismissed by the District Court, those defendants were not involved in the issue that was raised with the Court of Appeals or in this petition.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of Case	2
Reasons for Granting the Petition	5
I. Review Is Necessary To Resolve A Conflict Between The Circuits Regarding The Application Of The Continuing Violation Theory	6
A. The Third Circuit Erred In Rejecting The Continuing Violation Theory.	8
B. The Third Circuit's Holding Is In Conflict With Other Circuits.	10
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Beavers v. American Cast Iron Pipe Company,
975 F.2d 792 (11th Cir. 1992) 12

Bethel v. Jendoco Constr. Corp.,
570 F. 2d 1168 (3d Cir. 1978), *cert. granted*,
454 U.S 1140 (1982) 7

Bihler v. Singer Co.,
710 F.2d 96 (3d Cir. 1983) 6

Bronze Shields, Inc. v. New Jersey Dept. of Civil Service,
667 F.2d 1074 (3d Cir. 1981), *cert. denied*,
458 U.S. 1122 (1982) 8

Cox v. City of Memphis,
230 F.3d 199 (6th Cir. 2000) 9

Delaware State College v. Ricks,
449 U.S. 250 (1980) 6, 7, 8, 9

Gonzalez v. Firestone Tire & Rubber Co.,
610 F.2d 241 (5th Cir. 1980) 11-12

Guardian Ass'n v. Civil Service Comm'n,
633 F.2d 232 (2d Cir. 1980), *cert. granted*,
454 U.S. 1140 (1982) 10, 11

Cited Authorities

Page

Harel v. Rutgers, State Univ.,
5 F. Supp. 2d 246 (D.N.J.1998), *aff'd*, 191 F.3d 444 (3d Cir. 1999), *cert. denied sub nom, Harel v. Lawrence*, 528 U.S. 1117 (2000) 7

Miller v. Beneficial Management Corp.,
977 F.2d 834 (3d Cir. 1992) 7

Nat'l Railroad Passenger Corp. v. Morgan,
536 U.S.101 (2002) 7

Walls v. Mississippi State Department Of Public Welfare,
730 F.2d 306 (5th Cir. 1984) 10, 11

West v. Philadelphia Elec. Co.,
45 F.3d 744 (3d Cir. 1995). 7

Federal Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 i

42 U.S.C. § 2000e, *et seq.* i

42 U.S.C. § 2000e-5(e)(1) 1

42 U.S.C. § 2000e-5(f)(1) 6

State Statutes:

N.J.S.A. 10:5-1, *et seq.* i

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Filed January 5, 2004 ..... 1a

Appendix B — Opinion Of The United States District Court For The District Of New Jersey Dated March 10, 2003 ..... 13a

Petitioners respectfully petition for a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The District Court's Opinion by the Honorable John W. Bissell, Chief Judge, granting defendants' Motion to Dismiss was issued on March 10, 2003 and was not otherwise published. *See* Appendix B. The Court of Appeals' Opinion affirming the District Court was filed on January 5, 2004 and was not otherwise published. *See* Appendix A.

STATEMENT OF JURISDICTION

The Third Circuit entered its Opinion and Order on January 5, 2004. *See* Appendix A. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 United States Code § 2000e-5(e)(1) Title VII of the Civil Rights Act of 1964

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except, that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to

institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

STATEMENT OF CASE

Petitioners are three of ten African-American firefighters employed by the Fire Department in Newark, New Jersey, who filed a disparate impact case against the City of Newark and the State of New Jersey based on the 2000 New Jersey Department of Personnel Fire Lieutenant/Fire Captain promotional examination. On April 12, 2001, the list of the successful candidates eligible for fire captain positions was published ("the list or the eligibility list"), based on the results of the 2000 examination. Out of the 287 applicants, 129 individuals passed the examination: 91 of the successful applicants were White, 26 were Black and 12 were Hispanic.

Thus, the test results demonstrated that there was a significant disparity as to the Black candidates, with a statistical deviation of 3.81 units, well above the standard deviation criteria of 2.00. The 2000 exam selection rate for African Americans is approximately 53%, which is substantially lower than the 80% rate established in the Uniform Guidelines on Employee Selection Procedures. This evidence clearly established a *prima facie* case of discrimination.

Petitioners Bishop, Fleming and Brown passed the examination. Bishop received a score of 82.320 and was ranked 66 on the list. Fleming received a score of 83.520 and was ranked 56. Brown received a score of 79.380 and was ranked 93.

On or about April 12, 2001, Bishop filed an administrative appeal with the Merit System Board/ Department of Personnel, challenging the format and the administration of the 2000 exam. That appeal was denied in July, 2002.

On January 21, 2001, shortly after fifteen appointments were made from the list, petitioners, along with other firemen, filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") against the Newark Fire Department, alleging that utilization of the 2000 exam operated to exclude them based upon race, in violation of Title VII. On April 9, 2002, the EEOC issued a Right to Sue.

On February 19, 2002, the City of Newark made twelve additional promotions from the list. On July 22, 2002, thirteen more promotions were made from the list.

On May 7, 2002, petitioners filed a Complaint in the United States District Court for the District of New Jersey, Newark Vicinage, against the Newark Fire Department, the City of Newark, the State of New Jersey and the New Jersey Department of Personnel and Merit System Board (collectively referred to as "the State"), alleging violations of Title VII, the Uniform Guidelines on Employee Selection Procedures, a 1980 Consent Decree, Section 1981 and the LAD.

On July 9, 2002, the State filed a Motion to Dismiss in lieu of filing an Answer on the grounds of Eleventh Amendment immunity and failure to exhaust administrative remedies.[1] The City of Newark also filed a Motion to Dismiss on essentially the same grounds as the State.

On August 2, 2002, the petitioners filed a Charge of Discrimination with the EEOC against the State, alleging that the utilization of the 2000 fire captain promotional examination had a disparate impact on petitioners, that the eligibility list derived from the examination was defective and that the use of the use of the eligibility list continues to violate petitioners' Title VII rights.

On September 26, 2002, the District Court entered an Order and Opinion granting the State's Motion to Dismiss and granting in part and denying in part the City's Motion to Dismiss. On October 9, 2002, at the request of petitioners' counsel, the EEOC issued a Right to Sue.

Thereafter, on November 14, 2002, petitioners filed the instant action against the State and the City of Newark, alleging violations of Title VII, the LAD and Section 1981. On January 28, 2003, the State filed a Motion to Dismiss petitioners' Complaint in lieu of filing an Answer on the grounds of the action was barred by *res judicata* and collateral estoppel. On March 11, 2003, the District Court granted the State' Motion and dismissed petitioners' Complaint.

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1. The State also sought to have the District Court decline supplemental jurisdiction over the state law claim and abstain from exercising jurisdiction under the *Buford* doctrine.

On April 4, 2003, petitioners appealed the dismissal based on the limited issue of whether the ongoing use of the eligibility list to promote fire captains constituted a continuing discriminatory act under Title VII. On November 20, 2003, the Third Circuit heard oral arguments on the case and, on January 5, 2004, issued an Opinion affirming the District Court's Order dismissing petitioners' Complaint against the State.

REASONS FOR GRANTING THE PETITION

The question of whether the continuing violation theory should be applied to the use of the fire captain eligibility list, promulgated based on a discriminatory examination, during the entire period that the list is in effect is an issue of far reaching significance, because states and municipalities across the Country utilize such lists to hire or promote employees and there is a split among the Circuits regarding the application of this doctrine to eligibility lists.

Four of the Circuit Courts of Appeal, including the Third Circuit, have considered the application of the continuing violation theory to eligibility lists, with the Third and the Sixth Circuits declining to apply this principle to such lists and the Second and the Fifth Circuits ruling that use of an eligibility list for promotion or hiring constitutes a continuing violation.

The Third Circuit held that the use of the eligibility list to promote fire captains was a neutral act flowing from the alleged discriminatory examination, which did not constitute a continuing violation to extend the statute of limitations. As stated, the Third Circuit's ruling is in accord with the Sixth Circuit, however, it is in direct conflict with the Second and Fifth Circuits.

As this Court is well aware, employment discrimination continues to be one of the most important rights protected by law. Moreover, it has been well established that the procedural requirements of Title VII should be liberally construed in order to further its goals.

These principles mandate that an employee be given every opportunity to contest the testing mechanism used to decide hiring and firing. Petitioners contend that the Third Circuit's ruling in this case is patently incorrect because it deprives them of their right to protect themselves from discrimination, when their rights are repeatedly violated each time promotions are made from the list.

Thus, the question raised by this petition is of critical importance, because it concerns an ongoing problem, which is not treated uniformly across the country and, therefore, warrants the Court's direction to unify the split among the Circuits.

I. Review Is Necessary To Resolve A Conflict Between The Circuits Regarding The Application Of The Continuing Violation Theory

Title VII requires an aggrieved employee to file an EEOC charge against a state or local authority within 300 days after the occurrence of the alleged unlawful employment practice. *See* 42 U.S.C. § 2000e-5(f)(1); *Bihler v. Singer Co.*, 710 F.2d 96, 97 (3d Cir. 1983). In determining whether an EEOC charge has been timely filed, the Courts look to the specific discriminatory conduct identified in the charge. *See Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980).

This Court has determined that certain acts, such as discharge, failure to promote, denial of a transfer or refusal to hire, are discrete acts that can be pinpointed to a specific time point for statute of limitations purposes. *See Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002); *cf. Miller v. Beneficial Management Corp.*, 977 F.2d 834, 844 (3d Cir. 1992) (repeated failure to promote is distinguishable from a single discrete act). However, not all acts of discrimination are capable of such precise categorization, which has lead to the creation of an exception to the statute of limitations for cases involving ongoing acts of discrimination, which is known as the "continuing violation" doctrine. *Harel v. Rutgers, State Univ.*, 5 F. Supp. 2d 246, 261 (D.N.J. 1998), *aff'd*, 191 F.3d 444 (3d Cir. 1999), *cert. denied sub nom, Harel v. Lawrence*, 528 U.S. 1117 (2000).

In order to establish a continuing violation, a claimant must show that at least one discriminatory practice occurred within the relevant filing period, *see Ricks, supra*, 449 U.S. at 256-58, and that the discriminatory acts are not "isolated or sporadic acts of intentional discrimination." *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 (3d Cir. 1995). The Third Circuit has invoked the continuing violation theory in cases in which the plaintiff alleges that the defendant has followed a practice of successive discriminatory violations, *see Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168 (3d Cir. 1978), *cert. granted*, 454 U.S. 1140 (1982), and in cases where the employer's promotion decision-making process took place over a period of time. *See Miller, supra*, 977 F.2d at 844.

A. The Third Circuit Erred In Rejecting The Continuing Violation Theory.

However, in the case at bar, the Third Circuit rejected the continuing violation doctrine by relying on *Bronze Shields*, *supra* and *Ricks*, *supra*, finding that the promulgation and each use of the eligibility list was a neutral discrete act that was separate from the discriminatory examination. (App. A at. 7a-10a). In reaching its conclusion, the Court rejected petitioners' contention that they did not know with certainty that they would not be promoted until the end of the effective period of the list. (App. A at 10a-11a).

Petitioners respectfully contend that, in analyzing this issue, the Third Circuit misplaced reliance on both *Bronze Shields* and *Ricks*, which are factually distinguishable from the within matter. Specifically, in *Bronze Shields*, the plaintiffs were not listed on the eligibility roster and, thus, knew at the time the list was published that they would be promoted, so that their cause of action accrued on the date the list was published. *Bronze Shields*, *supra*, 667 F. 2d at 1083. In contrast, here, petitioners were in a completely different situation because they had been placed on the eligibility list and, accordingly, had a chance of being promoted during the entire period that the list was in effect.

A further distinction between *Bronze Shields* and the present case is that the eligibility list in *Bronze Shields* had not been used before plaintiffs filed their EEOC charge. *Id.* Indeed, in *Bronze Shields*, the Court specifically left open the issue of whether the statute of limitations would have tolled if the eligibility list was operational, as here, yet, in affirming the District Court, the Third Circuit completely relied on *Bronze Shields* as if the issue had been addressed. *Id.*, n.23 (App. A at 9a-10a).

The Third Circuit was equally incorrect in relying on the *Ricks* case, which is based on a completely different set of facts than the case at bar. This Court held in *Ricks* was that the continuing violation theory did not apply to claims based on isolated instances of past discrimination, in finding that the professor's denial of tenure was the discriminatory act and not the manner in which he was later terminated. *Ricks*, *supra*, 449 U.S. at 257-58. However, in the present case, petitioners are not alleging isolated instances of discrimination, but instead, base their claim on an ongoing and continuing practice of discrimination that began with the 2000 promotional examination and continues with each promotion made from the list derived from that examination.

Similarly, the Third Circuit misplaced reliance on *Cox v. City of Memphis*, 230 F.3d 199 (6th Cir. 2000), where the Sixth Circuit found that a continuing violation did not exist during the effective period of the list based on the Court's concern of "expos[ing] employers to virtually open-ended period of liability." *Id.* at 205. The Sixth Circuit's rationale is defective, and thus, should not have been adopted by the Third Circuit because the continuing violation theory would not expose an employer to open-ended liability, since eligibility lists have a limited life span, thereby restricting an employer's exposure. More importantly, the Sixth Circuit's holding promotes unnecessary litigation, because it forces potential claimants to file claims at the time the list is published, when they could still be promoted during the period that the list is in effect, would result in cases being filed that ultimately would be moot.

For example, in this case, Fleming, who was listed 56 out of the 129 on the list, may be reached for promotion before the list expires. However, under the *Cox* rationale

adopted by the Third Circuit, he, along with the other petitioners, should have filed a charge of discrimination when the list was published, even though he had a chance of being promoted during the effective period of the list. Instead, it is the continued use of the list, stemming from the discriminatory examination, which has an adverse affect on petitioners, because another act of discrimination occurs every time the list is used and petitioners are denied a promotion, which together constitute a pattern of discrimination.

Indeed, in the wake of September 11th, our entire nation is all too aware of the risks that our firemen and policemen assume in the performance of their daily job duties. The relevance of this risk is that it demonstrates that the composition of an eligibility list could drastically change in any given tragic moment, causing a person with a low rank, who may have been otherwise ineligible, to rise to a position of eligibility with one fell swoop.[2]

B. The Third Circuit's Holding Is In Conflict With Other Circuits.

The Third Circuit's decision is in absolute conflict with the Second and Fifth Circuits, which have applied the continuing violation doctrine to cases involving hiring or promotion eligibility lists. *See Guardian Ass'n v. Civil Service Comm'n*, 633 F.2d 232 (2d Cir. 1980), *cert. granted*, 454 U.S. 1140 (1982); *Walls v. Mississippi State Department Of Public Welfare*, 730 F.2d 306 (5th Cir. 1984). In *Guardian*, black and Hispanic police officers challenged the written

2. Similarly, a series of incidents could cause a firehouse or police station to suffer an unusually large loss of employees, thereby impacting the status of individuals on an eligibility list.

examinations used in making appointments to the New York City Police Department on the basis that they had a racially disparate impact. The defendants argued, as respondents argue in the case at bar, that the utilization of the examination-based eligibility lists was "merely the non-actionable perpetuation of the effects of past" discrimination. *Guardian, supra*, 622 F.2d at 249. The Second Circuit rejected this argument holding that:

> By utilizing the tainted test results for years after becoming subject to the commands of Title VII, defendants continued a course of discriminatory conduct that had indeed begun before the effective date of the Act but did not cease until defendants abandoned the practice of making hiring decisions in this manner. Even if the unjustified refusals to hire did not compromise the core of defendants' discriminatory conduct, at the very least they represented the culmination of a continuously maintained illegal employment policy.

Id.

The Fifth Circuit adopted the Second Circuit's rationale in *Walls*, which centered around the use of certificates of eligibility based on, *inter alia*, test results to hire certain state employees. The Fifth Circuit expressly rejected the position adopted by the Third Circuit in this case, that the use of the test results to determine eligibility was only an effect of a past illegal act, instead finding that the use of the invalid test results to determine eligibility for vacancies or ranking on eligibility certificates constituted a continuous violation for purposes of Title VII. *Id.* at 381-19. *See also Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir.

1980) (Fifth Circuit applied the continuing violation theory to discrimination claims arising out of a test that had a disparate impact, because the employer continued to use the test results to offer jobs); *Beavers v. American Cast Iron Pipe Company*, 975 F.2d 792, 796 (11th Cir. 1992) (The Eleventh Circuit recognized the Fifth Circuit's continuing violation standard for employment practices as set forth in *Gonzalez*, *supra*).

Thus, there is a direct conflict between the Circuits regarding the application of the continuing violation theory to cases involving the use of eligibility lists based on discriminatory examinations. The resolution of this conflict would have a widespread impact beyond this particular case, as states and municipalities across the country frequently utilize eligibility lists to hire or promote employees. Petitioners, therefore, respectfully urge the Court to consider the issue raised in this petition, in order to unify the Circuits regarding the application of the continuing violation theory to promotion and hiring eligibility lists.

CONCLUSION

Based on the foregoing, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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